



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Acker Electric Company, Inc.
File: B-250673
Date: February 12, 1993

D. Lee Roberts, Jr., Esq., Smith, Currie & Hancock, for the protester,
Maj. William R. Medsger and Cynthia T. Garrison, Esq.,
Department of the Army, for the agency.
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Protest that agency failed to perform a "fair market cost analysis" in support of an award under section 8(a) of the Small Business Act, in lieu of a "fair market price" analysis, is dismissed as untimely since the protester knew the basis for the protest more than 10 working days before the protest was filed.

2. Protest that agency's "fair market price" analysis was improper because it failed to include the protester's courtesy "offer" and other historical data is denied where record shows that the analysis was conducted reasonably.

DECISION

Acker Electric Company, Inc. protests the award of a contract to Thomas Electric Company, Inc. under request for proposals (RFP) No. DAAC01-92-R-0020, issued by the Department of the Army for the removal and replacement of 710 lighting fixtures in various buildings at the Army Depot in Anniston, Alabama. The protester alleges that the award was made at a price exceeding the amount permitted by law.

We dismiss the protest in part and deny it in part.

This procurement was conducted pursuant to section 8(a) of the Small Business Act, as amended, 15 U.S.C. § 637(a) (1988 and Supp. III 1991); under the 8(a) program--which is administered by the Small Business Administration (SBA) to assist developing business owned or controlled by disadvantaged individuals--SBA contracts with procuring agencies and certifies eligible firms which function as subcontractors, although they are called "8(a) contractors."

See 13 C.F.R. Part 124 (1992) and Federal Acquisition Regulation (FAR) Subpart 19.8. The contract price may not exceed a fair market price (FMP) for the items or services in question. 15 U.S.C. § 637(a)(1)(A); FAR § 19.806(b). The FMP must be determined in accordance with FAR § 19.807.

Thomas was issued the RFP on April 21, 1992. Prior to negotiations with Thomas, an Army electrical engineer prepared an independent government estimate (IGE) of \$167,042.47 using historical pricing data, standard estimating guides, Department of Labor wage rates, and supplier quotations. Based on the contracting officer's comparison of the IGE to the cost data and supplier quotations provided by Thomas in support of its offer, an FMP was established at \$167,737.60. Since the final negotiated price with Thomas was \$167,000, the firm was awarded a contract.

During the procurement process, Acker--a non-8(a) firm--submitted an "offer" of \$132,813 for the purpose of providing the Army with information that could be used in establishing the FMP; Acker stated in its "offer" that, if the 8(a) procurement were canceled and the requirement resolicited on an unrestricted basis, the Army could reseal its "offer" and consider it under any new solicitation. The agency did not use Acker's "offer" in determining the FMP because it contained no supporting cost data and was otherwise considered to be unreliable because the firm was then litigating a 1991 award based upon a set-aside for small disadvantaged businesses for similar services at Anniston.

In its initial protest submission, Acker argued that the Army awarded a contract to Thomas at a price exceeding the "fair market value" of the services to be rendered. More specifically, Acker stated that the FMP determination should not have been based on a comparison of Thomas' price to the IGE since the agency had other more reliable data which it was required to consider. Specifically, Acker argued that its own offer of \$132,813 was the best indicator of what the competitive market price should be and that the Army's refusal to consider its price was unreasonable. Further, Acker argued that the 1986-1988 historical average cost per fixture of \$184.63 under prior competitive Anniston contracts should have been considered.

Acker raised an additional issue for the first time in its comments on the agency report: that the use of the phrase "fair market cost" in section 1207 of the Defense Authorization Act of 1987, 10 U.S.C. § 2301 note (1988), required the Army to perform a preaward analysis which, according to the protester, is more stringent than the FMP analysis prescribed by regulations. We dismiss this argument as untimely since its basis was known to Acker more than 10 working days prior to the time its comments were filed. Bid Protest Regulations, 4 C.F.R. § 21.1(a)(2) (1992). Where, as here, a protester initially files a timely protest and later supplements it with new grounds of protest, the new arguments must independently satisfy our timeliness requirements; our Regulations do not contemplate the unwarranted piecemeal presentation of protest issues. Telephonics Corp., B-246016, Jan. 30, 1992, 92-1 CPD ¶ 130.

In this regard, it is clear from Acker's initial protest submission, which was based upon the agency's evaluation documents received in response to a Freedom of Information Act request, that the protester knew at the time its original protest submission was filed that the agency used an FMP analysis to conclude that Thomas' price was acceptable. If Acker believed that the use of the FMP standard set forth in the regulation was improper, it should have raised the issue in its original protest submission.

An agency may not award an 8(a) contract if the price would result in a cost to the government which exceeds a FMP. FAR § 19.806(b). FMP is defined as a price based on reasonable costs under normal competitive conditions and "not on the lowest possible cost." FAR § 19.001. The procedures for estimating FMP in 8(a) procurements require agencies to derive an FMP from price or cost analyses that may take into account commercial prices for similar services, available in-house cost estimates, cost or pricing data submitted by SBA and information obtained from any other agency. FAR § 19.807; Valley Constr. Co., B-247461.2, Aug. 6, 1992, 92-2 CPD ¶ 79. Under FAR § 15.805-2, "Price Analysis," the agency may use one or more of several listed price analysis methods, including comparison of the prices received in response to the solicitation with an IGE. We will not question an agency's FMP determination unless it is not reasonably based or there is a showing of fraud or bad faith on the part of agency officials. Id.

We have examined the record and, for the reasons set forth below, find that the agency's IGE and FMP were reasonably based and that the Army acted reasonably in not considering Acker's price and the historical price average for previous contracts in its FMP determination.

The agency's estimate of the cost of materials used in its IGE was based on a master list of historical prices for specific quantities of materials known to be needed for this project supplemented by commercial prices available in a pricing guide for items where historical information was unavailable and market research in the form of quotations from local suppliers for the lighting fixtures to be replaced. During the analysis, the engineer used his judgment to lower some of the pricing data he reviewed. Direct labor costs were derived by using a standard estimating guide with revisions to reflect the actual conditions under which this project was to be performed and the prevailing wage rates from the Department of Labor for the area. Burdened labor costs were predicated on historical construction contracting experience at Anniston. Overhead was estimated using a 10-percent rate based on historical averages at Anniston and profit was also calculated on the same basis using a 10-percent rate. The cost of bonding was based on information supplied by SBA for its 8(a) program. Finally, the engineer's estimate was checked against detailed cost data from the most recent Anniston fixture replacement contract--the only contract for which such data was available. The FMP was derived by comparing the IGE to Thomas' cost and pricing data, considering two quotations from local suppliers provided by the (8)a firm.

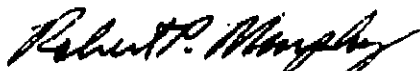
We think that the agency's method of constructing its IGE and developing the FMP from it was reasonable. Acker, on the other hand, while not arguing that the method used by the agency to construct the IGE was unreasonable, states that a more accurate measure of the FMP can be derived from its "offer" or from the use of the average prices paid for fixtures in past. We do not agree.

First, we do not think that the agency acted unreasonably in disregarding Acker's "offer" as an accurate indicator of FMP. Nothing in FAR § 19.807 required the agency to consider such an "offer" from a non-8(a) firm not eligible for an award under the terms of this RFP. Despite Acker's contention that its willingness to have the offer considered in a future unrestricted procurement made the offer "valid and binding," such is not the case. In the eventuality that a procurement in which the firm could compete would be conducted, it would be under a new solicitation under which Acker would be free to submit a new offer. In view of this and considering the fact that Acker has been actively opposing both the 8(a) and the small disadvantaged business program at Anniston, we think that the contracting officer could suspect that Acker's "offer" was not an accurate guide for establishing an FMP for the project.

Moreover, we note from the cost breakdown submitted by Acker during the course of the protest that the principal difference between Acker's price and the IGE is accounted for by the fact that the protester based its price on a combined overhead and profit rate of only 5 percent--a figure that is approximately 28.5 percent less than the total of separate overhead and profit rates the firm had been using to price recent change orders at Anniston. Acker has not explained its significant change in pricing strategy except to say that, whatever rates it used, its price is indicative of the lowest possible price available to the Army. This is not the test for determining FMP, as that term is defined in FAR § 19.001, and, therefore, it does not show that the Army's determination did not reasonably reflect the FMP in this case.

Finally, as to Acker's argument that the agency should have used the 1986-1988 average price per fixture under prior Anniston contracts, the agency points out that the contracts for fixture replacement have varied from year to year in terms of conditions to be encountered in various buildings and that this affects the amount of labor and the types and amounts of materials required from contract to contract. Thus, the Army submits that it is illogical to assume, given the specific conditions of the buildings covered by this contract, where labor is expected to be greater because of the demolition and replacement work to be performed, historical rates based on differing conditions are a more reliable indicator of FMP than an IGE tailored to the conditions to be encountered in the present project. We think that the Army had a reasonable basis for concluding that conditions differ from contract to contract so that historical pricing averages do not necessarily serve to predict the FMP, and we have no basis to question the Army's decision not to use this type of data in its analysis.

The protest is dismissed in part and denied in part.


for James F. Hinchman
General Counsel